A LETTER

TO

CHARLES BUTLER, Esq.

ON

THE DOCTRINE

OF

Presuming a Surrender of Terms

ASSIGNED

TO ATTEND THE INHERITANCE.

BY

EDWARD BURTENSHAW SUGDEN, Esq.

THE SECOND EDITION, WITH ADDITIONS.

LONDON;

PRINTED FOR W. CLARKE AND SONS, PORTUGAL STREET,

LINCOLN'S INN;

By R. Wilks, Chancery Lane.

1819

A LETTER,

&c. &c.

MY DEAR SIR,

It has long been the policy of our legislature to encourage the free alienation of real property, and secure the titles of *bonâ fide* purchasers. Our statute book abounds with laws having this tendency. The same spirit pervades the common law. We are told, that the maxims of the common law, which refer to descents, discontinuances, nonclaims, and to collateral warranties, are only the wise arts and intentions of the law to protect the possession and strengthen the rights of purchasers. A purchaser is a favourite of a court of equity. It is the settled law of that court, that if a man buy an estate fairly, he may get in a term of years or other incumbrance, although it is satisfied, and thereby defend his title at law against any mesne incum-

brance of which he had not notice. It were idle to discuss the policy of our law. In a commercial country like our's, where one great stimulus to enterprize in commerce is the hope to possess territorial ownership, every one is interested in the free interchange of property and the safety of purchasers. The danger of latent incumbrances renders it necessary that every possible guard should be thrown around purchasers. The policy of the law in this respect led to the received doctrine as to terms of years attendant on the inheritance. Abstractedly considered, nothing can be more absurd, than that a purchaser of the fee should procure a term of years, created a century ago, to be assigned to a trustee for him. But with reference to the protection to be derived from such a term of years, it is of the deepest importance to a purchaser that he should keep it on foot. At law, every term of years in a trustee is *a term in gross*. This, which was distinctly laid down by Lord Hardwicke, in 1 Term Rep. 765, should never be lost sight of. The moment that a court of law acts upon the term as a part of the inheritance, it strikes at the root of the settled doctrines of centuries, shakes the landmarks of the law of real property, and renders insecure the title of every purchaser in the kingdom. Our law permits the creation of terms of years for any period of time. When a term,

whether for one hundred or ten thousand years, is created by way of use, it invests the person to whom it is granted with the legal right to the estate during the period specified. It is not necessary by our law that possession should accompany the legal estate, in order that the title of the legal owner should continue unbarred. Possession by my tenant, or by a person with my permission or acknowledging my title, is in law possession by me, and during such tenancy or holding, my title remains unimpeached; therefore, although the legal owners of the fee of an estate have enjoyed it for the last one hundred years, yet that will not affect the existence of a term of years in a trustee to attend the inheritance; because the possession of the legal owner of the fee is the possession of the termor: their titles are consistent, and support each other. The owner of the fee is as a tenant at will to his own trustee. It frequently happens that the owner of the fee is indebted to the term of years for his peaceable possession; such a possession, therefore, operates as a continual acknowledgment of the legal title of the termor, and proves it's efficacy. The term is anxiously assigned to attend the inheritance: it does accordingly attend the inheritance, and the performance of the very service for which it was created never can be a ground for defeating it's legal operation. Upon prin-

ciple, therefore, a term of years assigned to attend the inheritance ought not to be presumed to be surrendered, unless there has been an enjoyment *inconsistent with the existence of the term, or some act done in order to disavow the tenure under the termor, and to bar it as a continuing interest.* This has always been the received opinion of the profession, and particularly of that class of the profession to whom titles are more particularly referred. It matters very little what is the opinion of any individual conveyancer, but the opinion of the conveyancers, as a class, is of the deepest importance to every individual of property in the state. Their settled rule of practice has accordingly in several instances been adopted as the law of the land—not out of respect for them, but out of tenderness to the numerous purchasers who have bought estates under their advice.

As judgments and other incumbrances are infinite, and it is impossible to rely even upon searches for them, the doctrine that a term of years attendant on the inheritance should protect a purchaser against incumbrances of which he had not notice, was long since established. This rule of property was shaken in the time of Lord Mansfield, when the courts of law broke down the boundary between them and courts of equity; but the barrier has since been restored, and

equitable doctrines are no longer acted upon in courts of law.

Now, with a view to discuss at large the doctrine of presuming a surrender of a term assigned to attend the inheritance, let us suppose a term of years to be created in the year 1700, by way of mortgage. *B* buys the fee in 1760, and pays off the mortgage, and the term is assigned to a trustee for *B*, his heirs and assigns, and to attend the inheritance. *B* lives till 1819, without disturbing the term, or in any manner recognizing it's existence. Can it be contended, that a surrender of the term should be presumed? Was not *B*'s possession consistent with the existence of the term immediately after the assignment in 1760? If so, when did it become adverse to it? What necessity was there for any act recognizing the existence of the term, when *B*'s continued possession was consistent with the term, and was supported by the trust upon which it was assigned? If the term ought to have been recognized from time to time, how often should the act be repeated—once a week, or once a month? Is there any ground upon which, in 1819, a surrender can be presumed on the strength of *B*'s possession, which would not be equally operative the first week, nay, the first day after the purchase in 1760? In the absence of evidence of a surrender, it is impossible, on any sound principle,

to presume one; unless the precise instant can be pointed out when the owner of the inheritance was desirous to no longer have the benefit of the term. Without his presumed concurrence, a surrender cannot be presumed; for the trust was not to surrender the term, by which mesne incumbrances might be let in, but expressly to keep it on foot, in order to exclude them. A surrender by the trustee, therefore, without the direction of his *cestui que trust*, would be a breach of trust. It is said, that the expense of making out a representation to a termor, makes the term a burden instead of a benefit to the owner of the fee. It is not however denied, that the owner of the fee may keep on foot a term attendant on the inheritance, and that no court of law can controul his power to do so. Where he has exercised his power, and declared without any limitation of time, that the term shall be attendant on the *inheritance*, and be in trust for him, *his heirs and assigns*,—Does not this mean, that the inheritance shall be so attended during all the years to come in the term?—and if it do, what power has a court of law, out of a morbid compassion for him on account of the expense which it may occasion, to presume a surrender of the term which he has so anxiously kept on foot; particularly as at the very moment that a surrender of the term is presumed, it's existence may be required

to protect the estate against a latent incumbrance; and the court has no means whatever to ascertain whether there is any such incumbrance. The amount of the expense, too, must depend upon the particular circumstances of each case; and yet it would hardly be desirable that the rule should depend on the quantum of expense which an assignment would occasion. If, however, expense is to be adverted to, on that ground alone, surrenders should not in such a case be presumed; because that doctrine would weaken a purchaser's reliance on any given term of years: he would in almost every case search for judgments. This could not be done without expense; and where a man has been in the habit of confessing judgments, it very seldom happens that satisfaction is entered up on them when they are paid off. This leads to great expense and difficulty in practice; because a purchaser expects the judgments to be regularly discharged; and where even a few years have elapsed since the payment of the debt, if the creditor is living and can be traced, yet he hesitates to do any further act in relation to a transaction which he considered long since closed.

If the surrender of the term cannot be presumed at *B*'s death in 1819, we will suppose the estate to descend to *B*'s heir at law. Now no man ever heard of an heir at law executing a deed for

the sole purpose of recognizing terms of years attendant on the inheritance, or taking assignments of them to new trustees to attend, where they had already been assigned to trustees of his ancestor's nomination for that purpose. His possession, however, comes in the place of his ancestor's; and why should he be deprived of the guard which his ancestor created for his benefit? If his ancestor's possession was the possession of the trustee, it will not be denied that his possession stands in the same relation. The trust is to attend the *inheritance*, and for *B*, his *heirs* and assigns; therefore, under the express words of the trust, the heir is entitled to the benefit of it, and his possession is the possession of the trustee.

Suppose further, that *B*'s heir, in 1820, make a marriage settlement without noticing the term of years,—could the term on that account be presumed to be surrendered? We know that it is *not* the practice upon a marriage settlement to reassign attendant terms to new trustees; and no prudent practitioner declares the trust of attendant terms by the settlement, lest the parties upon an ejectment should be defeated by the production of their own conveyance, upon the face of which it would appear that the legal estate was outstanding, and I never saw or heard of a separate declaration to that effect on a marriage. In short, it is not the practice to advert to terms of years on

a marriage settlement, or on a devolution from ancestor to heir, although no doubt that may have been done, and with propriety, in some particular cases. It is very rare indeed, that upon a marriage the title is investigated. In ninety-nine cases out of a hundred the parties take up the title with the settlement, conveyance, or will, under which the husband or wife immediately claims. This is a fact. In my own experience I recollect very few instances where the title was investigated, and those were upon the marriages of persons of consequence; and I do not remember a single case in which a new assignment was taken, or a declaration of trust made of a term before assigned to attend the inheritance. At the time of the settlement, a fraud by the husband is not contemplated. No purchaser or mortgagee would accept the title without inquiring for a settlement; and as the wife would, in most cases, be entitled to dower if there was no settlement, her concurrence in a fine would be required, and that would at once lead to a discovery of the settlement. Neither is it usual to deliver to the trustees of a marriage settlement the deeds relating to the term. Such a thing was, I believe, never done. The tenant for life, it is settled, is entitled to the custody of the deeds. The trustees have merely the custody of one part of the settlement.

If *B*'s heir was entitled to the benefit of the term in 1820, when he made the settlement, can the execution of the settlement deprive him of its aid? Is the act inconsistent with the existence of the term? Was it not declared to attend the *inheritance*, and to be in trust for *B*, his *heirs and assigns?* Suppose the heir, as is usual, to take a life-estate under the settlement, and to be in of the old use; can it be contended, that this proportion of the old use is inconsistent with the title of the trustee, although the latter was consistent with the use in fee in the heir? Why should an act be done to recognize the term? The assignment of the term to attend the *inheritance* speaks at all times, whilst the possession is consistent with the title of the trustee of the term. The universal practice, not to require assignments of attendant term on descents or settlements, proves unequivocally the opinion of the profession, that the possession of the heir and of the persons claiming under the settlement, is in law the possession of the trustee of the term. Length of time in this case is unimportant. If we alter the above dates, and state *B*'s purchase to be in 1800, his death in 1805, and the settlement in 1810, the principle is precisely the same; and it would startle most men to hear, that because the term had not been recognized since it's assignment in 1810, a surrender of it may be presumed.

If, however, the term is, as I strongly submit to you it is, a subsisting interest after the settlement, let us suppose the life-estate of *B*'s heir under the settlement to be sold immediately afterwards, without the purchaser's taking an assignment of the term,—Does this let in the presumption of the surrender of the term? Now the term, I must repeat, was assigned to attend the *inheritance*, and in trust for *B*, his *heirs and assigns*. If the possession of the heir and his family under the settlement was not adverse to the title of the termor, how could the title of the purchaser be so? The term is a benefit, originally assigned as such, and not an incumbrance. A man should at least reject a benefit, or act inconsistently with the intention of the person bestowing it, before he is presumed to repudiate it. The event, if the event is to be looked at, upon which this question hinges, shews that he required the protection of the term more than any of the former owners; and if *his* acts are to be adverted to, we shall find him anxiously obtaining a further assignment of the term. For let us further suppose, that *B*'s heir, before his settlement, confessed a judgment which was not satisfied, and that the purchaser bought without notice of it; and when he did discover it, procured an assignment of the term to a new trustee, and set up the term as a defence against

an execution upon the judgment. *Unless the presumption of the surrender is an inevitable conclusion from the fact of the purchase,* it must be admitted, that there is no ground to presume a surrender. But can it possibly be laid down as a rule, that every attendant term must be presumed to be surrendered against a purchaser who does not take an assignment of the term, or a declaration of the trust of it at the time he purchased. Why should he do so, whilst his possession is consistent with the title of the termor, and expressly within the limits of the original trust? Would not an assignment, a week, or a month, or a year afterwards, before any adverse claimant appeared, be sufficient to keep the term on foot? If so, when, at what precise moment does the presumption arise?

Where an easement, for example, is enjoyed, or having been enjoyed, is discontinued to be used, the user or nonuser forcibly lets in the presumption of a grant in the one case, and a surrender in the other. But there the act speaks for itself. The whole argument in my case is, *that there is a continued enjoyment under the original trusts, which embrace all the persons who have successively enjoyed the estate.* Therefore, as an enjoyment of the easement would of itself, without any further assertion of right or declaration, exclude the presumption of a surrender; so

here the continued enjoyment must have the same operation.

Does then the appearance of the adverse claimant weaken the purchaser's case? So far from it, that in the great majority of the cases in the books, the protection was not sought for until the necessity for it appeared. Equity does not regard notice at the time of getting in the term. The notice to operate must be fixed upon the party at the time of the completion of the purchase. Equity too will assist a purchaser where he has not got an assignment of the term, but has the better title to it. At law, as I have already observed, the term is a term in gross, and the courts of law ought not to enter into a consideration of the equities of the parties; because they have not the necessary machinery to enable them to come to a due conclusion on the equitable rights. It has been decided in equity, that if a mortgagor, after a defective mortgage in fee, confess a judgment, the judgment creditor, although he has the legal title, shall be postponed to the mortgagee. *(a)* So it has been held *(b)* that a prior mortgagee, having a subsequent judgment, may tack the judgment to the mortgage;

(a) Burgh *v.* Francis, 1 P. Wms. 279, cited.

(b) Anon, 2 Ves. 663. Brace *v.* Duchess of Marlborough, 2 P. Wms. 491.

but a prior judgment creditor, getting a subsequent mortgage, cannot do so; *because the judgment is not a specific lien upon those lands,* that is, he does not go on the security, he has not trusted to the credit of the estate. A judgment creditor, therefore, does not, in equity, stand on the same footing with a purchaser of the estate itself. In a case *(c)* where there was, 1. an act of bankruptcy by *A*; 2. a settlement for valuable consideration by him, without notice to the parties of the act of bankruptcy; and, 3. a commission against him;—although the commission overreached the settlement, yet the persons claiming under it, were held to be entitled to the benefit of an outstanding term created prior to the bankruptcy.

These cases show the rules of equity, which flow from the anxiety of the court to strengthen the title and protect the possession of purchasers; but if at law, the outstanding term is to be presumed to be surrendered, they will no longer afford any protection to purchasers.

Some stress, in favour of the presumption, has been laid on two circumstances; the one, that the estate has been quietly enjoyed; the other, that the deeds relating to the term are in the hands of the owner of the estate. The first circumstance I have

---

(c) Wilker *v.* Bodington, 2 Vern. 599.

already endeavoured to prove, is against the presumption of a surrender. The latter can never operate in favour of the presumption, unless the courts of law deny the power of a man to keep an attendant term in a trustee and the deeds in his own possession. There is no case in which the trustee of the term keeps the deeds. They form part of the muniments of title, and are kept as such by the owner of the fee. If it be necessary upon a sale to covenant for their production, by whom but the owner should the covenant be entered into? And the covenant should of course be entered into by the person holding the deeds. The trustee of the term, if even the deeds were deposited with him, could not be compelled, and would not be advised to covenant for the production of them. Besides, the case of Doe *v.* Scott, which will be referred to presently, fully answers that objection. That the judgment creditor has not the possession of the deeds, and therefore the surrender, if there be one, is not likely to be in his hands, cannot surely be a ground to presume that there actually is such a surrender. If the judgment creditor has the better equity, which is the true inquiry in these cases, he may file a bill against the purchaser, who would be compelled to answer, whether there was a surrender or not.

Suppose that the assignment, when it is taken, is made, not by the original trustee, who

is dead, but by his son, who has regularly taken out administration to him,—Does that weaken the case? Certainly the administrator could not know that his father had not surrendered the term in his lifetime; but he was more likely to know the fact than any other person. For the family solicitor would of course peruse the deed on his behalf, and if a surrender had been made of the term, which probably would have passed through his office, he would not have suffered the son, as administrator, to execute an assignment of it. Besides, if some deed is, in the absence of all evidence of it's actual execution, to be presumed, why should not a new assignment to attend be presumed, if that were necessary to support the purchaser's title, rather than a surrender, which would operate to defeat it. For his possession, I repeat, was consistent with the term, and he trusted his money on the security of the estate itself, which the judgment creditor did not.

Fifteen years ago, it was, as you are aware, very much the practice, to leave terms already assigned to attend the inheritance, in the original trustees, and to be satisfied with a general declaration of trust of all attendant terms. It never occurred to the highly respectable persons by whom that practice was adopted, that a surrender of the terms could be presumed. It were diffi-

cult to contend, that a mere general declaration is sufficient to keep the term alive, if without it the presumption of it's surrender would be let in. The trustee of the term, by force of the original trust, becomes, without any further declaration, a trustee for the purchaser. Now, if the trust be a trust for the purchaser, and the latter do no act amounting to a disclaimer of the benefit of the trust, how can it vary his rights, that he neglected to redeclare that which has already been expressly declared, *viz.* that the trustee should hold the term for the original owner, his heirs and assigns, and to attend the inheritance.

Lord Hardwicke, in Willoughby *v.* Willoughby, enters very fully into this doctrine. He admitted, that where an old term has been assigned upon an express trust to attend the inheritance as settled by such a deed, and the conveyancer is satisfied that the uses of the inheritance have never been barred 'till the new purchase or settlement is made, he may very safely rely upon it, because the very assignment carries notice of the old uses. Nay, where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may entirely rely upon it, especially in the case of a purchase, where the title deeds always are or ought to be taken in: for if he has the creation and the assignment of the term in his own hands, no use can be made of it

against him; 1 Term Rep. 772. Lord Hardwicke thus states cases in which terms may be safely left in the original trustees; but it never occurred to him, that the circumstance of so leaving them would let in the presumption that they were surrendered.

It is said, that this doctrine withdraws a large portion of the real property in the kingdom from the jurisdiction of the courts of common law. That, however, is not so; because the title of the termor is the legal one, and therefore those courts, in such cases, decide upon the legal title, which only is within their province. The term is set up, not in bar of the jurisdiction over the property, but in consequence of the rule of the court itself, which forbids an equitable tenant to recover against the legal title. If even the doctrine had the supposed operation, that would depend upon the law of the land, and if it required alteration, should be altered by the legislature. But the courts of law have been so anxious to support attendant terms, that it has been settled ever since the reign of Charles the Second, that such a term shall not be barred, even by a fine levied by the owner of the fee, against the intention of the conusor; because such an owner of the inheritance must be taken as tenant at will to his trustee, and then his possession is the possession of the trustee, 1 Ventr. 82; 2 Ventr. 329; 1 Sid. 460.

Mr. Justice Buller observed, in Doe *v.* Pegge, 1 T. Rep. 760, n. that so long ago as the time of Justice Gundry, when an outstanding satisfied term was offered as a bar to the plaintiff's recovery, that judge refused to admit it, saying, that there was no use in taking an outstanding term but for the sake of the conveyancer's pocket, since which time, Mr. Justice Buller added, it has been the uniform practice, that if the plaintiff be entitled to the beneficial interest, he shall recover the possession. It does not appear in what case Mr. Justice Gundry made this sweeping observation. It is, however, not law at this day, and indeed never was to the extent in which it was laid down; and Mr. Justice Buller lived to see the law on this subject restored, and his own opinions overruled; see Doe *v.* Staple, 2 Term Rep. 684. In the same case of Doe and Pegge, Lord Mansfield observed, *that trusts are a mode of conveyance peculiar to this country.* In all other countries, the person intitled has the right and possession to himself; but in England, estates are vested in trustees, on whose death it becomes difficult to find out their representatives, and the owner cannot get a complete title. If it were necessary to take assignments of satisfied terms, terrible inconveniences would ensue from the representatives of the trustees not being to be found. Sir Edw. Northey's clerk was

trustee of near half of the great estates in the kingdom. On his death it was not known who was his heir or relative. So that, where a trust term is a mere matter of form, and the deeds mere muniments of another's estate, it shall not be set up against the real owner. It must excite surprise, that Lord Mansfield should have imagined, that any rule, whose tendency it was to subvert what was peculiar to this country, could long subsist whilst the peculiarity itself was allowed to exist. As well might you admit the rule which excludes the half blood; and yet, in the face of contrary evidence, presume that a brother of the half blood proceeded from the same couple of ancestors as the person last seised. Is the whole system of trusts to be subverted, because sometimes an obscure trustee dies without relations? Or is the legal estate to subsist or not, according to the expense which a reconveyance may occasion in any given case? This doctrine never could stand the test of an accurate investigation, and has long since been overruled. They who have best understood the doctrines of equity have powerfully deprecated their adoption by courts of law.

In Goodtitle *v.* Morgan, 1 Term Rep. 755, a mortgage for 999 years was made in 1761 by Jones, the owner of the fee. In 1767, Jones made a mortgage in fee to Morgan; and in July 1769, he made a mortgage in fee to another per-

son. In 1768, the 999 years term was assigned to a trustee for Jones, and to attend the inheritance. The first mortgage in fee was before that assignment, and the last after it. In December 1769, he made a mortgage in fee to Sprigg, and the term of 999 years was assigned to a trustee for Sprigg, and he was allowed to recover in ejectment, on the demise of his trustee, against the two prior mortgagees in fee; although it was speciously argued, that if, previous to the conveyance in 1769 to Sprigg, the defendants had brought ejectments upon their mortgages, neither Jones nor his trustee could have set up this term as a bar to their ejectment; and that, if Jones himself could not set up the term, it seems to be absurd to say that those who claim under him can, for they cannot claim a greater estate than he had. But this argument did not prevail, although Mr. Justice Buller did not put the decision on the right grounds. The case is an authority for my position. It decides clearly, that a surrender of the term cannot be presumed, on the ground that the first mortgagee did not take an assignment or a declaration of trust of it. A second mortgagee, therefore, procuring an assignment of the term, must prevail at law, and also in equity, unless he had notice at the time he advanced his money of the first mortgage.

In Doe *v.* Staple, 2 Term Rep. 696, Lord Kenyon, C. J. said, that he extremely approved of what was said by Lord Mansfield in the case of Lade *v.* Holford, that he would not suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but would direct a jury to presume a surrender. He added, "I much approve of that; and where a surrender is presumed, there is an end of the legal title created by the term."

In Doe *v.* Sybourn, 7 Term Rep. 2, the same learned Judge said, that in all cases *where trustees ought to convey to the beneficial owner,* he would leave it to the jury to presume *where such a presumption might reasonably be made,* that they had conveyed accordingly, *in order to prevent a just title from being defeated by a mere matter of form. (a)*

Now these rules, it will be observed, are not in favour of presuming a surrender of a term expressly assigned to attend the inheritance, against a purchaser. The doctrine, that a mortgagor shall not set up an attendant term against the mortgagee, does not warrant the presumption of a surrender in this case. In the

---

(a) And see Goodtitle *v.* Jones, 7 Term Rep. 47; Roe *v.* Reade, 8 Term Rep. 118.

former case, there are only the rights of the mortgagor and mortgagee still in question, and the presumption is made in favour of the mortgagee. The claim of a third person does not intervene. But does it follow that a surrender should be presumed, not as between the mortgagor and mortgagee, but as between two innocent mortgagees, both claiming under the same mortgagor, where one, after the execution of both of the mortgages, has obtained an assignment of the term? Why is he to be excluded from the benefit of his diligence? Why is this plank in the shipwreck to be taken from him? The doctrine can with much less propriety be applied where the person who has obtained an assignment of the term is an actual purchaser of the estate, whilst the person whom he seeks to exclude by the term is a mere judgment creditor, having only a general lien over all the seller's property, and who perhaps suffered the judgment to remain dormant many years. The objection is not, that a surrender cannot be presumed against *an owner of the inheritance*, but that the presumption ought not to be made against a *purchaser* of the inheritance, where the contest is between him and incumbrancers claiming under the *seller*, but of whose claims he had not notice. Even the case of Goodtitle *v.* Morgan, in the decision of which Mr. Justice Buller concurred, proves that the mere

circumstance of executing mortgages without assigning the term, does not let in the presumption of a surrender against a subsequent mortgagee who takes an assignment of the term. Upon principle, it seems impossible to contend, that the circumstance of the last mortgagee's not procuring the assignment at the very moment he advances the money, can let in the presumption of a surrender.

The rule, that where trustees ought to convey to the beneficial owner, a jury may presume such a conveyance, in order to prevent a just title from being defeated by a mere matter of form, is not denied to be a wise one; but it does not apply to the case under discussion: for, in this case, the trustees ought *not* to surrender the term; to do so, would be to commit a breach of trust; and the presumption, if it is made, has not the merit of preventing a just title from being defeated by a mere matter of form, but lets in one title to the destruction of another, *where the equities are at least equal:* for if the subsequent purchaser has not *equal equity* with the prior incumbrancer, equity itself will deprive him of the protection of the legal term, where it is beyond dispute an existing one.

The case of Keene *v.* Deardon, 8 East, 248, proves, that possession, where it is consistent with the title of a trustee, cannot be deemed adverse to

it, and that no presumption of a surrender shall be made contrary to an express trust. This proves both the propositions in the case under discussion. Possession is certainly evidence of title, but it is not evidence of the quality of the title. It does not prove, whether you are seised in fee, or have a mere chattel interest; nor does it prove, whether your title is legal or equitable. And therefore possession may always be shown to be consistent with the title of a trustee of an attendant term. So where there is an express trust to attend the inheritance, a surrender of the term should never be presumed where the rights of the *cestui que trust* are not invaded by the trustee, and the *cestui que trust* has done no act to disavow his right to the trust of the term.

The case of Doe *v.* Scott, 1 East, 478, is a strong authority against the doctrine of presumption. In 1727, Lord Oxford executed a mortgage for a term of one thousand years. In 1751, Lord Oxford executed a marriage settlement, wherein it was stated, that 27000*l.* part of the lady's fortune, was to be applied to the discharge of the mortgage, since that time no mention was made of it, nor was there any other evidence of it's existence, 'till, in a mortgage deed of the 3d of Dec. 1802, this term, together with another outstanding term of 1709, was assigned to secure the mortgage money. It was insisted, that a sur-

render of the term ought to be presumed, on two grounds: 1st, The recital in the deed of 1751, that there was an adequate sum to be applied in discharge of the mortgage, and no evidence of the term's having been acted upon or recognized from that period until 1802, when it was assigned as an outstanding term: and, 2ndly, the possession of the deed itself by Lord Oxford, the owner of the inheritance, which could not have happened, unless the mortgage had been paid off. The learned judge who tried the cause, held that, although no notice had been taken of the term from 1751 'till 1802, yet the owner of the inheritance having then joined with the representatives of the termors in executing a deed, in which it was recited that the term had not been surrendered, he thought that a surrender could not be presumed. The Court of King's Bench were of the same opinion.—Lord Ellenborough, C. J. said, that there was no purpose of justice to be answered by presuming a surrender in this case; nor was it for the interest of the owner of the inheritance to have such a presumption made. It might have been his intention to keep alive the term, and to have it assigned to a trustee to attend the inheritance.

Now this case went much further than it is necessary for me to push the doctrine in the case under discussion. In 1751, a sum was appro-

priated to discharge the incumbrance; and as the deeds were in Lord Oxford's possession, the mortgage must have been paid off. The term had not been assigned to attend the inheritance, and therefore, for fifty-one years, the period between 1751 and 1802, the term was *an incumbrance*, and not a benefit; and yet the assignment of 1802 was held to be evidence against a surrender. Why was it stronger evidence than the assignment of the term in trust for the purchaser in my case? There, too, the term had been assigned to attend the inheritance, and therefore the possession was consistent with the express trust of the term; whereas, in Lord Oxford's case, the freeholder's possession was only consistent with the legal title in the mortgagee, under the *equitable* rule, that the mortgagee, when paid off, became a trustee for the owner of the inheritance. It is said, however, that there it was for the benefit of the owner that the term should be kept on foot. What circumstance, in the supposed case, required that the term should be presumed to be surrendered? Was not the purchaser the owner of the estate? and was it not for his benefit that the term should be deemed a subsisting interest?

Lord Eldon's opinion does not accord with the doctrine of presuming surrenders of attendant terms. In Evans *v.* Bicknell, 6 Ves. 184,

which was decided in 1801, that learned Judge observed, that it seemed to him rather surprising, if he might presume to say so, that Lord Mansfield, who concurred with Mr. Justice Buller in a great many of these equitable principles in a court of law, should not have attended to these distinctions, which perhaps will be found in the very principles upon which the Court of Chancery exists. Titles to property may possibly be found to be very considerably shaken by the doctrine of the Court of King's Bench as to satisfied terms. The law as to that here is, that a second mortgagee having no notice of the first mortgage, if he can get in a satisfied term, would do that which is the true ground of the decision, though it is not put upon that by Mr. Justice Buller; he would, as in conscience he might, get the legal estate, and by virtue of that protect his estate against the first mortgagee having got a prior title, the conscience being equal between the parties. When once it is said at law, that a satisfied term should not be set up in ejectment, the whole security of that title is destroyed; and therefore, even with the modern correction that doctrine has received in the late cases, which is, that you may set up the term, though satisfied, and put it as a question to the jury, whether an assignment is to be presumed; it seemed to his lordship very dangerous between purchasers, and

the leaning of the court ought to be, that it was not assigned: and he fully concurred with Lord Kenyon, *that it is not fit for a judge to tell a jury they are to presume a term assigned, because it is satisfied; but there ought to be some dealing upon it,* or you take from a purchaser the effects of his diligence in having got in the legal estate, to the benefit of which he is entitled. Then suppose the law takes upon itself to decide the question between purchasers upon this subject, can it decide upon the same rules as courts of equity, as upon the question of notice? It will be said upon this doctrine, a court of equity does inquire into this, and it is a rule of property in equity, and therefore ought to be a rule of property at law. But how has it become a rule of property in equity? In equity, the first mortgagee may ask the second whether he had notice. If that defendant positively denies notice, and one witness only is produced to the fact of notice, if the denial is as positive as the assertion, and there is nothing more in the case, a court of equity will not take the benefit of the term from the second mortgagee, placing as much reliance on the conscience of the defendant as on the testimony of a single witness, without some circumstances attaching a superior degree of credit to the latter. It is impossible, therefore, that the rule of property can be said to be the same as at law, and if

it stands upon different principles, in fact, it is perfectly different.

In Maundrell *v.* Maundrell, 10 Ves. 246, which was decided in 1804, the question arose, whether a purchaser could protect himself against dower, by a prior term of years, unless it was actually assigned to a trustee for him; and the Lord Chancellor ultimately decided that he could not; because such had been considered the general rule; but his lordship, upon principle, thought that the purchaser would, as in other cases, be entitled to the benefit of the term, without an actual assignment. He said, that he doubted whether it was possible, upon principle, to say the assignment of a term, that has been once assigned to attend the inheritance, is necessary from time to time, whenever that inheritance is made the subject of purchase. 10 Ves. 259, and see p. 269.

The opinion of the Lord Chancellor therefore is, that an assignment of the term is not necessary upon every new purchase; and this is a powerful authority against the presumption of a surrender, on the mere ground that the term has been left undisturbed. Maundrell *v.* Maundrell, is not an authority requiring an assignment in every case upon every new purchase; but whilst it establishes the necessity of an actual assignment, in order to bar dower, is a

grave authority for the continued existence of the term in other cases, although it is left in the name of the original trustee.

In the late case of Doe on the demise of Burdett *v.* Wright, B. R. T. T. 1819, a term assigned in 1735, to raise an annuity, and subject thereto to attend the inheritance, was presumed to be surrendered. No act had been done to acknowledge the term, except that, upon a sale in 1801 of a small part of the estate, for redeeming the land-tax, the owner had covenanted to produce to the purchaser the deeds creating and assigning the term. There, however, the ejectment was by a person claiming as heir, against a person who claimed also as heir.

But in the cases of Doe *v.* Hilder, and Doe *v.* Stace, B. R. *(a)* which were decided after-

---

(a) Another question of great importance arose in these causes, which it became unnecessary to decide, *viz.* whether the Statute of Frauds enabled a judgment creditor, under an elegit, to take the term in execution. The statute, it is decided, did not intend to place the right of the creditor on the same footing against an equitable as against a legal estate; and it does not enable him to take in execution an equity of redemption, or a trust in a leasehold. Now, every attendant term is at law a chattel real—a term in gross, and therefore cannot be taken in execution for the debt of the *cestui que trust.* The legislature never intended to reduce a fee simple estate with an attendant term to a level with a chattel in-

wards in the same term, it appeared, that the ejectment was brought by a judgment creditor, who had issued an elegit against Richard Newman. In 1762 a regular mortgage term of one thousand years was created by Francis Hare Naylor, the owner of the fee, and several further charges were made previously to and in the year 1770. In 1771, Naylor devised the estate to trustees to sell. In 1779, they sold and conveyed to John Newman in fee, and the one thousand years' term was in consideration of the payment of the mortgage-money assigned by a separate deed (7th October, 1779) to a Mr. Denman, his executors, administrators and assigns, "in trust for the said John Newman, *his heirs and assigns*, and to be assigned, conveyed, and disposed of as he or they should direct and appoint. *And in the meantime, and until such*

---

terest, and to give the right of execution as if it were a chattel interest, where under the same circumstances a mere chattel interest would not be within the statute. The act in all it's provisions is inaccurately framed, and it is not desirable that another new construction should at this day be given to it. A term outstanding has always been considered to protect against judgments; but if the construction above alluded to were to prevail, it would be necessary to search for judgments in every case, in order to ascertain whether any writ of execution had issued, or rather the term would be no protection, because it could not be discovered whether a writ had issued.

appointment, to attend and wait upon *the freehold and inheritance of the same premises,*" to protect the same against mesne incumbrances. In October, 1790, John Newman died intestate, leaving Richard his brother and heir. In November, 1797, Richard died, leaving Richard, his son, his heir, then a minor. On 23d August, 1808, the last named Richard gave a warrant of attorney to the lessor of the plaintiff to enter up judgment for 4000*l.* which was immediately done. In 1810, Mr. Denman, the trustee of the term, died intestate, leaving John Denman, his son and next of kin. In Oct. 1814, Richard Newman, on his marriage, settled the estate to the use of himself for life, with remainder over in strict settlement. In June, 1816, he sold and conveyed his life-estate to his mother, and she devised the estates to the persons under whom the defendant claimed as tenant. In 1817, the lessor of the plaintiff issued an elegit, without having revived the judgment, and had an inquisition taken thereon, which was set aside for irregularity. In 1818, he revived the judgment by *scire facias,* and issued an elegit; and on 13th March, 1818, an inquisition was taken thereon, and then the ejectment was brought. On 17th March, 1819, (after the commencement of the ejectment,) John Denman, as the son and next of kin of Mr. Denman, took out letters of administration to him,

and by a deed, dated the 19th of the same month, he, by the direction of the devisees of the purchaser, in the usual and regular way, assigned the term to a trustee for them, and to attend the inheritance. *The deed creating the term was produced by a purchaser of the largest part in value of the estate comprised in it. The deed assigning the term to attend, on the purchase by Mr. Newman in* 1779, *and the last deed of assignment, were produced by the defendants.* The learned Judge thought, that the question as to a surrender ought to go to a jury. His lordship told them, that it seemed to him, that as the trustee was appointed forty years ago, and had never done any act, but that the party who was beneficially interested had always acted on the property, he (the learned Judge) could not consider an administration taken out but a week before the assignment as at all effective; that he considered to be done merely for the purpose of setting up this old term to defeat the plaintiff; and under such circumstances, he should leave it to them to presume it had been surrendered, which, according to the learned Judge's report, the jury expressly said they did. The Court of King's Bench, after hearing the case argued at considerable length, and taking time to consider, confirmed the learned Judge's direction.

Lord Chief Justice Abbott delivered the following judgment, according to the Shorthand-writer's note:—

"This was an action of ejectment, tried before my brother Park, at the last assizes for the county of Sussex. The title of the lessor, for the plaintiff, was upon a judgment recovered in the year 1808, against Richard Newman, for 8000*l.* and a writ of elegit and inquisition thereupon in the year 1818, finding Richard Newman seised in fee of the premises in question. It was further proved, that the defendant occupied the land as a tenant, and had declared, that he considered it to belong to Richard Newman, and had delivered to him a notice of a judgment received in June, 1818, from the lessor of the plaintiff. On the part of the defendant it was proved, that on the 23rd of June, 1762, Francis Hare Naylor had conveyed the premises in question, *inter alia*, to Thomas Carter, for a term of one thousand years, by way of mortgage, for securing the sum of 6000*l.* That in the year 1779, the mortgage was paid off, and deeds were then executed; whereby in effect the term was assigned to William Denman in trust for John Newman, a purchaser of the premises, and to attend the inheritance: That in the month of October, 1814, the said Richard Newman, to whom the premises had descended from the pur-

chaser, John Newman, made a settlement upon his intended marriage; whereby he conveyed the premises to trustees and their heirs, to the use of himself for life, with a remainder to his intended wife for life, remainder to the issue of the marriage, and reversion to himself in fee: That in the year 1816, the said Richard Newman conveyed his life estate to Sarah Newman, the mother of Richard, as a security for 1162*l.* which appears to have been money then due from him to her: That Mrs. Newman the mother died in the year 1817, having previously devised her interest to some other relations: That William Denman, to whom the term had been assigned in trust to attend the inheritance as aforesaid, died about four years ago, and on the 19th of March last his son took out administration to him, and executed a deed purporting to be an assignment of the term, to a person therein named, in trust for the devisees of Mrs. Newman the mother. Upon this evidence, two questions were made at the trial, —First, Whether the term might be presumed to have been surrendered and merged in the inheritance; and if it might not, then, whether it was a trust within the 10th section of the Statute of Frauds, so as not to stand in the way of the execution on the judgment. The learned Judge thought this a case in which a jury might presume a surrender of the term, and the matter

being left to them, they found, that the term had been surrendered. A motion was afterwards made for a nonsuit, according to leave given by the learned Judge. A rule to shew cause was granted, and the matter was argued before us very fully and ably. The same two points were made, and, with respect to the Statute of Frauds, a further point also, it being contended, first, that the trust of a term of years is not within the 10th section of the statute; and, secondly, if it be, yet in this particular case the statute would not help the plaintiff, because the termor must be considered as a trustee, not for the debtor, but for the devisees of Mrs. Newman, at the time of issuing the execution. Upon these points, however, it is not necessary for us to pronounce any judgment; because we are of opinion, that in this case the surrender of the term might lawfully and reasonably be presumed. It is obvious, that if such a surrender had been made, it would not probably be in the power of the plaintiff to produce it, he being a stranger to the particulars of the title which his debtor had in the land. The principal ground of objection to the presumption was, that such a presumption had in no instance hitherto been made against the owner of the inheritance, the former instances being (as it was said) all cases of presumption in favour of such owner. But this proposition appears to be too

extensively laid down: one of the instances, in which it has been said that a surrender shall be presumed, is the case of a mortgagor setting up a term against his own mortgagee; and this is said generally, and without distinction between a mortgagee in fee or for years. But if such a term be set up against a mortgagee for years, and a surrender presumed, the presumption is made against, and not in favour of, the owner of the inheritance. It is made against his interest at the time of the trial, but in favour of his honesty at the time of the mortgage; for if the term existed at the time of the mortgage, he ought in honesty to have secured the benefit of it to the mortgagee at that time, and not to have reserved it in his own power as an instrument to defeat his mortgage; and upon the same principle, on which a surrender is presumed in the case of mortgagor and mortgagee, we think it may reasonably be presumed in the present case; though the principle is applicable not to the judgment creditor, but to other persons. One of the general grounds of a presumption is, the existence of a state of things, which may most reasonably be accounted for by supposing the matter presumed. Thus the long enjoyment of a right of way by *A* to his house or close over the land of *B*, which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such right by the

owner of the land; and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter, a release of it, is presumed. Where a term of years becomes attendant upon the reversion and inheritance, either by operation of law, or by special declaration upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion, thus become the *cestui que trust* of the term, may be accounted for by the union of the two characters of *cestui que trust* and inheritor, and without supposing any surrender of the term; and therefore, in general, such enjoyment, though it may be of very long continuance, may possibly furnish no ground to presume a surrender of the term. But where acts are done or omitted by the owner of the inheritance, and persons dealing with him as to the land, which ought not reasonably to be done or omitted, if the term existed in the hands of a trustee, and if there do not appear to be any thing that should prevent a surrender from having been made; in such cases, the things done or omitted may most reasonably be accounted for by supposing a sur-

render of the term, and therefore a surrender may be presumed: We think there are such things in the present case. In the year 1814, Richard Newman, the debtor, and then owner of the inheritance, made a settlement upon his intended marriage, which took place immediately. Upon such an occasion, the title and title-deeds of the husband would probably be looked into by professional men on the part of the husband, at least, if not on the part of the wife also; and notwithstanding the assertion of one of the learned gentlemen who argued this case on the part of the defendant, and by whom we were informed that it is not usual on such occasions to take any notice of an outstanding satisfied term, we cannot forbear thinking that such a term always ought to be, and frequently is, in some way noticed, either by the deed of settlement, or by some separate instrument; because, if not noticed, and the termor not called upon to assign the term to the uses of the settlement, nor any declaration of trust made of it to those uses, it may afterward be made an instrument of defeating the settlement. The title-deeds usually remain with the husband, and if he be driven by necessity to borrow money, he may meet with a lender who has no notice of the settlement, and by handing over his deeds, and obtaining an assignment of the term to him and other conveyances, give to

him a title that must prevail both at law and in courts of equity against the settlement. The supposed practice of taking no notice of outstanding terms on such an occasion, appears to have been insisted upon before Lord Hardwicke, in the case of Willoughby v. Willoughby, as applied to marriage settlements and purchases. But that very learned Judge, in giving his judgment in that case, says, he had inquired of a very learned and eminent conveyancer, and could not find that there had been any such general rule: and he afterwards proceeds to say, 'Where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may safely rely upon it, especially in the case of a purchase or mortgage, where the title-deeds always are, or ought to be, taken in; for if he has the creation and assignment of the term in his own hands, no use can be made of it against him. Such instances as these may account for the practice in many cases, but cannot constitute a general rule.' If in the present case it had appeared that the deeds relating to the term were delivered to the trustees of the marriage settlement as one of the securities for the settlement, the case would have stood on a very different ground. The marriage settlement, however, is not the only occasion on which we think it may most reasonably be supposed that

this term, if existing, would have been brought forward. It appears that, in 1816, the same Richard Newman being then indebted to his mother, and desirous of giving her security for the debt, prevailed upon his wife to join with him in conveying to her the interest they derived under the settlement. Upon this occasion, an assignment of the term, or a delivery of the deeds relating to it, would undoubtedly have been most important acts in favour of the mortgagee, because they would have protected the mortgagee against any subsequent use of the term to defeat her mortgage. On both these occasions, therefore, the term, if existing, could not have been wholly disregarded, without either want of integrity on the part of Richard Newman, or want of care and caution on the part of the professional men engaged in those transactions. We think it more reasonable to presume a prior surrender of the term, than to presume such deficiencies. It certainly might not unreasonably be left to a jury to consider, to what cause they would attribute these omissions, and this was done at the trial. It is true, that an assignment of the term was taken in a few days before the trial, for the alleged benefit of the legatees of the mortgagee, Mrs. Newman, on whose behalf we were informed the present cause was defended. But this

tardy act cannot be of any avail, and leads not to any presumption. The assignment was made by the administrator of the person in whom the term had been vested, and the administrator would probably be ignorant of any previous surrender made by the intestate. The time for dealing with the term on behalf of the mortgagee was the date of the mortgage. An actual assignment of the term is more regarded than it's mere quiescent existence. It will defeat the title to dower, which it's existence only will not, according to the case of Maundrell and Maundrell, Vesey, Jun. vol. vii. page 567, and vol. x. page 246, and the cases there cited. These observations respecting the settlement and the mortgage receive additional force from the consideration of their dates. They were both long subsequent to the judgment, and they are the acts of a person materially interested in protecting the land from the judgment, and excluding all questions on the subject of priority or otherwise; in the case of the settlement, for the sake of his intended wife and the issue that he might expect by her; and in the case of the mortgage, for the ease of the mortgagee, to whom he was so nearly related, and who also was evidently a favoured creditor. And it cannot be denied, that an actual assignment of the term would have been in many respects more

operative against the judgment than it's mere existence. In the case of the mortgage, it would have put an end to all question upon the Statute of Frauds, by making the termor specifically a trustee for the mortgagee before execution issued, according to the case of Hunt *v.* Coles, 1 Com. Rep. 226. For these reasons we think the verdict ought not to be disturbed, and the rule must therefore be discharged."

You will at once observe, that this is a stronger case in favour of the existence of the term than that which I have put for the sake of illustrating my argument. There was no circumstance which pointedly called for an assignment of the term before the period when one was made; for, as I have already observed, an assignment is never made by reason of descents or of a marriage settlement. Previously to the sale, therefore, the presumption could not on any reasonable ground be let in; and if not, such a presumption ought not to have been made at all. There could be no doubt which ought to be preferred,—the purchaser, or the judgment creditor. The latter obtained his judgment on a warrant of attorney, and slept on his security for ten years, and never had a specific lien on the estate, but a general security riding over the whole of the seller's property; whereas the purchaser not only

bought the estate itself without notice of the incumbrance, but had possession of all the deeds relating to the term, to the possession of which he was entitled as a purchaser. That circumstance alone, even as between two mortgagees of the estate itself, both of them equally innocent, would give the better right to the one holding the deeds. *(a)* As between a purchaser of the estate and a mere judgment creditor, the rule applies with irresistible force. The purchaser, therefore, clearly had *the better equity;* and the presumption of the surrender, without any evidence upon which to ground it, let in the judgment creditor on the estate in the hands of the purchaser, although, according to equity and good conscience, the creditor had no title to rank as such. The presumption too let in the judgment creditor on the estates provided for the wife and children by the marriage settlement; for the term could not be presumed to be surrendered against the purchaser, and in existence for the benefit of the wife and children. And yet, gentlemen in very great practice never knew an instance of an attendant term being reassigned on a marriage, and have suffered hundreds of settlements to be executed without requiring such an assignment;

(a) Stanhope *v.* Earl Verney, 2 Eden, 81.

so that the provisions made for very many families may be deeply incumbered, if this new rule is to be followed. It will not be contended, that the subsequent conduct of the purchaser of the life-estate ought to affect the wife and children of the seller; and yet, it is undeniable, that the circumstance of the purchaser's not taking an assignment of the term was relied upon as a strong ground in favour of the presumption. The assignment was made by Denman's administrator, who was regularly such as next of kin, and not a mere stranger procuring a limited administration *de bonis non*, for the purpose of assigning the term.

It is now difficult to say in what cases a term can be relied upon; for the presumption must have been made with reference to some period of time previously to the purchase by Sarah Newman. It would be dangerous, therefore, to rely on any term of years which has not on every change of possession been assigned to a new trustee; nor would it be safe to rely on such a term, if any of the owners have been in possession for a long period, although it is not of course in my power to draw the line.

I do not recollect any decision in my time which has so powerfully attracted the attention of the Profession; but the great respect which is due to the very learned Judges by whom the case

was decided, will lead you to doubt the correctness of my conclusions.

I am,

My dear Sir,

With much respect,

Your sincere and very obedient Servant,

EDWARD B. SUGDEN.

Lincoln's Inn,
[6 July, 1819.]
24 July, 1819.

Printed by R. Wilks, Chancery lane, London.